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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/720,862	11/24/2003	Timothy J. Taylor	29475/39204	5172
48995	7590	02/20/2007	EXAMINER	
MARSHALL, GERSTEIN & BORUN LLP (DIAL)			OGDEN JR, NECHOLUS	
233 S. WACKER DRIVE			ART UNIT	PAPER NUMBER
6300 SEARS TOWER			1751	
CHICAGO, IL 60606				
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		02/20/2007	PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/720,862	TAYLOR ET AL.	
	<b>Examiner</b> Necholus Ogden	<b>Art Unit</b> 1751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 22 November 2006.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-3,5,6,9 and 11-26 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-3, 5-6, 9, 11-26 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                         | Paper No(s)/Mail Date. _____ .                                    |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ . | 5) <input type="checkbox"/> Notice of Informal Patent Application |
|  | 6) <input type="checkbox"/> Other: _____ .                        |

***Response to Amendment***

1. Claims 1-3, 5-6, 9, 11-26 rejected under 35 U.S.C. 103(a) as obvious over Seitz, Jr. et al (6,861,397) is withdrawn in view of applicant's statement of common ownership.
2. Claims 1-6 and 9-24 rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-15 of U.S. Patent No. 6,861,397 is withdrawn in view of applicants' terminal disclaimer.
3. Claims 1-3, 5-6, 9, 11-16 and 26 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Beerse et al (6,294,186).

Beerse et al disclose an antimicrobial composition that is effective again Rhinoviruses and E-coli bacteria (col. 2, lines 1-10). Moreover, said composition comprises 0.01 to 20% by weight of a benzoic acid analog such as salicylic acid (col. 6, lines 20-33); water as a carrier (col. 9, lines 28-31); alcohol such as dihydric alcohols, isopropanol, ethanol or dipropylene glycol (col. 9, lines 44-55 and example 16-17); and a pH of 2-4 with sodium hydroxide pH adjusting agents (col. 19, lines 24-35). Note, see examples 13 and 17.

As this reference teaches all of the instantly required it is considered anticipatory.

In the alternative, if the above listed claims are not anticipatory, it would have nonetheless been obvious to one of ordinary skill in the art to combine the components with sufficient specificity to encompass the claimed invention, because each of the components are taught for comprising an antimicrobial composition and the artisan of

ordinary skill would have been motivated to combine the component, absent a showing to the contrary.

4. Claims 1-3, 5-6, 9, 11-26 are rejected under 35 U.S.C. 102(e) as being anticipated by Seitz, Jr. et al (6,861,397).

The applied reference has a common inventor/assignee with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

Seitz, Jr. et al disclose an antibacterial personal cleansing composition comprising 0.001 to 5.0% by weight of a topically active compound; 0.5 to about 25% by weight of a water-soluble hydric solvent; 0 to 5% of a co-surfactant; and water (col. 6, lines 1-40). Seitz, Jr. et al further teach that said compositions have a log reduction of 3-5 and a pH of 4-9 (col. 3, lines 40-65) and have an efficacy against E. coli and other bacterial or viral organisms (col. 7, lines 10-55). With respect to the topically active compound, Seitz, Jr. et al teach that said compound includes salicylic acid (col. 13, line 21 or 36) and said hydric solvent includes dipropylene glycol, isopropyl alcohol or ethanol (col. 15, lines 55-61) and pH adjusters include sodium hydroxide (col. 16, lines 40-46). See claims 1-8, and 14-15.

As this reference teaches all of the instantly required it is considered anticipatory.

***Response to Arguments***

5. Applicant's arguments filed 11-22-2006 have been fully considered but they are not persuasive.

Applicant argues that Beerse et al teach that the addition of a metal-acid complex is "found to provide a synergistic immediate and residual anti-viral and antibacterial efficacy to surfaces to which such compositions are applied" and therefore suggest that the metal-acid, in addition to the aromatic acid compound, acts as an additional anti-microbial agent.

The examiner contends that applicant's claims are bound by the transitional phrase of "comprising which permits the inclusion of additional components not specified in the claim. Moreover, as stated by applicant", Beerse et al do not require metal-acids in all of the embodiments (col. 3, lines 41-47). Therefore, Beerse et al do not require a metal-acid component, applicant's claims permit the use of additional ingredients not specified and one would assume that the metal-acid component is not critical as a anti-microbial agent if is not suggested in every embodiment.

Applicant argues that Beerse et al fail to suggest a surfactant having 0 to 0.2%; and 5 to 50% by weight of a hydric solvent.

The examiner respectfully disagrees and directs applicant's attention to column 27, lines 55-60, which teaches less than 10% by weight of surfactants are needed. Moreover, as stated above, examples 13 and 17 do not disclose a surfactant. With respect to the hydric solvent, example 17 states 8% by weight of dipropylene glycol.

Applicant argues that example 21 does not comprise a metal-salt but also does suggest high levels of surfactants.

The examiner contends that a reference does not need to teach each of the components in an example to specifically teach the claimed invention with sufficient specificity and Beerse et al clearly teach embodiments without metal-salt complexes and low amounts of surfactants as suggested above. See, Ex parte A, 17 USPQ2d 1716 (Bd. Pat. App. & Inter. 1990) See also In re Sivaramakrishnan, 673 F.2d 1383, 213USPQ 441 (CCPA 1982).

Applicant suggests comparative examples 2 and 3 of his specification for proof of unexpected results.

The examiner contends that criticality cannot be established because applicant has not compared the closes prior art with the claimed invention. Moreover, said comparative examples are not commensurate in scope with the claimed invention or the prior art of record. Whether the unexpected results are the result of unexpectedly improved results or a property not taught by the prior art, the "objective evidence of nonobviousness must be commensurate in scope with the claims which the evidence is offered to support." In other words, the showing of unexpected results must be reviewed to see if the results occur over the entire claimed range. In re Clemens, 622 F.2d 1029, 1036, 206 USPQ 289, 296 (CCPA 1980). An affidavit or declaration under 37 CFR 1.132 must compare the claimed subject matter with the closest prior art to be effective to rebut a prima facie case of obviousness. In re Burckel, 592 F.2d 1175, 201 USPQ 67 (CCPA 1979). "A comparison of the claimed invention with the disclosure of each cited

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reference to determine the number of claim limitations in common with each reference, bearing in mind the relative importance of particular limitations, will usually yield the closest single prior art reference." In re Merchant, 575 F.2d 865, 868, 197 USPQ 785, 787 (CCPA 1978)

***Conclusion***

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Necholus Ogden whose telephone number is 571-272-1322. The examiner can normally be reached on M-T, Th-Fri.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Douglas McGinty can be reached on 571-272-1029. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Necholus Ogden  
Primary Examiner  
Art Unit 1751

No  
2-13-2007